Nos. 80-1134, 80-1155 and 80-1170

APR 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., ET AL.,
Petitioners

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,
Petitioners

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Petitioners

v.

SECRETARY OF LABOR, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF UNION RESPONDENT IN OPPOSITION

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Respondent United Steelworkers of America, AFL-CIO-CLC ("USWA"), submits this memorandum in opposition to the petitions for writs of certiorari in these cases.

In light of the recent Memorandum for the Federal Respondents, and the letter of petitioner Lead Industries Association, Inc. ("LIA"), dated April 21, 1981, in response to USWA's application for extension of time, there is apparently a consensus among the parties on the following points: First, the Secretary has the authority to engage in a further rulemaking proceeding with respect to the occupational health standard governing employee exposure to lead;[1] second, the Secretary has announced his intention to conduct such a proceeding with respect to all the issues presented in these petitions (Fed. Resp. Mem. at 8); third, that rulemaking proceeding may alter the substance of the standard and will, in any event, alter the content of the record and of the Secretary's findings; fourth, in these circumstances, "review by this Court of the lead standard would be inappropriate at the present time . . ." (*ibid.*).

In addition, the Secretary has announced his "intention that the lead standard now in effect . . . should be left undisturbed" (*id.* at 10-11), and LIA has "support[ed]" that position in urging this Court to "act favorably on the Government's request . . ." (LIA Letter of April 21, 1981 at 1-2). To the extent that the Secretary intends to enforce the present standard, USWA too concurs with his position.

There remain only two areas of disagreement. USWA opposes the Secretary's suggestion that this Court accomplish the objective of "refraining" from review by "grant[ing] the petitions for certiorari [and] vacat[ing] the judgment of the court of appeals. . . ." (Fed. Resp. Mem. at 10). As we understand it, this is a request for

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[1] See note 2, *infra*. Of course, the question whether the Secretary may conduct a cost-benefit analysis in such a rulemaking proceeding is presently before the Court in *American Textile Manufacturers Institute* v. *Donovan*, Nos. 79-1429 and 79-1583 ("the *Cotton Dust* case").

a summary ruling on the merits of this case. We submit that such a course is neither appropriate nor necessary to the objective the Secretary seeks to achieve. The Secretary has not made a showing, nor could he, that any issue in this case should be disposed of in such extraordinary fashion. Moreover, the granting of certiorari and vacation of the judgment of the court below is not necessary for the Secretary to conduct the proposed rulemaking proceeding. That proceeding can go forward in the same fashion if this Court simply denies the petitions for certiorari.[2]

The second area of disagreement results from the apparent indication by the Secretary (Fed. Resp. Mem. at 10-11) that, if this Court follows the approach he suggests, he intends not to enforce those portions of the present lead standard—*i.e.*, the provisions for compliance by engineering and work-practice controls—which this Court stayed "pending the filing and disposition of petitions for certiorari" (Order of December 8, 1980, at 1). But whether this Court adopts the Secretary's approach of granting certiorari and vacating the judgment below or USWA's approach of denying certiorari, the stay would, by its terms, no longer be applicable and no proceedings would be pending in this Court upon which to grant a further stay. In either event, all provisions of the standard would then be fully operative.

We add one last point. In light of the Secretary's proposed rulemaking, there is no reason to hold these petitions pending this Court's decision on the merits in *American Textile Manufacturers Institute* v. *Donovan*, Nos. 79-1429 and 79-1583 ("the *Cotton Dust* case"). Whatever governing interpretations of the statute may

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[2] The Secretary is authorized by § 6(b) of the Act, 29 U.S.C. § 655(b), to "modify or revoke any occupational safety and health standard" provided that he complies with the rulemaking procedure set forth in that section.

emerge from the *Cotton Dust* decision will apply to the proposed rulemaking here.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari in these cases should be denied.

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